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Tiow Weng Theong v Melawangi Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(W)-310–02 OF 2017
TENGKU MAIMUN, NALLINI PATHMANATHAN AND HARMINDAR SINGH JJCA
4 JULY 2018

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Tort — Defamation — Libel — Documents placed in bundles marked as Part A — Whether authenticity of documents in question in dispute — Whether truth of contents of documents in issue — Whether defence of justification made out — Whether alleged defamatory words set out in verbatim in particulars of claim — Whether there was prejudice

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This was an appeal by the appellant ('the defendant'), a joint owner of a unit of Melawangi Tower, against the decision of the High Court which held that he was liable for defamation against the respondent ('the plaintiff'), a wholly-owned subsidiary of Amcorp Group Bhd and the developer of a piece of commercial property known as the Amcorp Trade Centre ('the ATC'). The defendant was dissatisfied with the manner in which the first AGM was conducted and claimed that the Chairman was clearly in cahoots with the plaintiff. The defendant wrote a letter entitled 'Complaint on the Conduct of AGM on 08/04/2008 and Request for EGM'. Following this letter, Amcorp Trade Centre Owners and Tenants Association ('ATCOTA') lodged an official complaint with the Petaling Jaya City Council and the Commissioner of Buildings ('PJCCB'). The PJCCB called for an EGM. The plaintiff attempted to have the EGM posponed but when the PJCCB did not, the plaintiff filed a judicial review action of the decision to call for the EGM. The High Court granted an a restraining injunction. During this period, one 'Jimmy Teo' sent an email entitled 'Amcorpmall Amended Letters'. In the said email, it was mentioned that 'the developer presented an account that showed an unusually huge loss of RM10.8million ...'. The plaintiff requested that the defendant withdraw the allegation but the defendant did not comply. The plaintiff initiated 13 separate defamation suits against 13 committee members of the ATCOTA. Nine suits were struck out upon the application of the relevant committee members while four suits remained. The High Court allowed the plaintiff's claim against the defendant and ordered damages to be assessed. Hence the present appeal.

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Held, allowing the appeal with costs:

(1) When litigating parties place their documents in bundles marked as Part A, as opposed to Parts B or C, they are expressly acknowledging and accepting that: (a) the authenticity of the documents in question are not in dispute; and (b) the truth of the contents of the documents are not in issue. The High Court judge erred in holding that the documents in Part A required proof of the truth of the contents of the documents. Therefore, the defence of justification was made out (see paras 72 & 76).

(2) The law on pleadings is clear. The alleged defamatory words should be set out in verbatim in the particulars of claim and usually in the form of a quotation. A description or summary of the content, purport or effect is insufficient. Any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon. The judge erred in allowing the plaintiff to adduce additional alleged defamatory statements in verbatim and in the form of quotations mid-trial and even after trial. This amounted to a breach of natural justice as the defendant was not able to meet the case of the plaintiff which was being litigated in stages. This occasioned prejudice to the defendant (see paras 82–83).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan'), pemilik bersama satu unit Menara Melawangi, terhadap keputusan Mahkamah Tinggi yang memutuskan dia bertanggungjawab terhadap fitnah terhadap responden ('plaintif'), sebuah anak syarikat milik penuh Amcorp Group Bhd dan pemaju sebidang harta komersil yang dikenali sebagai Pusat Dagangan Amcorp ('ATC'). Defendan tidak berpuas hati dengan cara AGM pertama dijalankan dan mendakwa bahawa Pengerusi jelas terlibat dengan plaintif. Defendan menulis surat bertajuk 'Complaint on the Conduct of AGM on 08/04/2008 and Request for EGM'. Berikutan surat ini, Persatuan Pemilik dan Penyewa Pusat Dagangan Amcorp ('ATCOTA') membuat aduan rasmi dengan Majlis Perbandaran Petaling Jaya dan Pesuruhjaya Bangunan ('PJCCB'). PJCCB membuat satu EGM. Plaintif cuba menunda EGM ini tetapi apabila PJCCB tidak melakukannya, plaintif memfailkan tindakan semakan kehakiman keputusan untuk membuat EGM. Mahkamah Tinggi membenarkan injunksi penangguhan. Dalam tempoh ini, seorang 'Jimmy Teo' menghantar e-mel bertajuk 'Amcorpmall Amended Letter'. Di dalam e-mel tersebut, disebutkan bahawa 'pemaju membentangkan akaun yang menunjukkan kerugian yang sangat besar sebanyak RM10.8million ...'. Plaintif meminta supaya defendan menarik balik tuduhan tersebut tetapi defendan tidak mematuhinya. Plaintif memulakan 13 saman fitnah berasingan terhadap 13 anggota jawatankuasa ATCOTA. Sembilan saman telah diselesaikan melalui permohonan ahli jawatankuasa berkaitan manakala empat saman lagi kekal. Mahkamah Tinggi membenarkan tuntutan plaintif terhadap defendan dan memerintahkan agar ganti rugi ditaksir. Oleh itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Apabila pihak berlitigasi meletakkan dokumen mereka dalam kumpulan yang ditandakan sebagai Bahagian A, berbanding dengan Bahagian B atau C, mereka dengan jelas mengakui dan menerima bahawa: (a) kesahihan dokumen yang dipersoalkan itu tidak dipertikaikan; dan (b) kebenaran kandungan dokumen itu tidak dipersoalkan. Hakim Mahkamah Tinggi terkhilaf dalam menyatakan bahawa dokumen-dokumen dalam Bahagian A memerlukan bukti kebenaran isi dokumen tersebut. Oleh itu, pembelaan justifikasi telah dibuat (lihat perenggan 72 & 76).

(2) Undang-undang tentang pliding adalah jelas. Perkataan-perkataan yang dikatakan fitnah hendaklah dinyatakan secara verbatim dalam butir-butir tuntutan dan biasanya dalam bentuk petikan. Penerangan atau ringkasan kandungan, pengantar atau kesan tidak mencukupi. Apa-apa pernyataan fitnah yang lain selain yang dikemukakan secara khusus sepatutnya tidak dipertimbangkan atau diadili. Hakim terkhilaf dalam membenarkan plaintif memasukkan pernyataan fitnah tambahan secara verbatim dan dalam bentuk petikan semasa perbicaraan dan bahkan setelah perbicaraan. Ini terjumlah sebagai pelanggaran keadilan alam semulajadi kerana defendan tidak dapat memenuhi kes plaintif yang dipertikaikan secara berperingkat. Ini menyebabkan prejudis terhadap defendan (lihat perenggan 82–83).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 597–835.

Cases referred to

Amgeneral Insurance Bhd v Sharul Ahmad & Anor [2015] 1 CLJ 532, HC (refd)

Bidari Ehsan Sdn Bhd (in Liquidation) v Inai Tropika Sdn Bhd [2015] MLJU 378; [2015] 1 LNS 714, HC (refd)

CB Land Sdn Bhd v Syarikat Perumahan Negara Bhd [2015] 7 CLJ 753, HC (refd)

Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)

Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd [2017] 2 MLJ 629; [2017] 6 CLJ 129, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Melawangi Sdn Bhd v Lim Kian Hian (Suit No 22–1946 of 2008) (unreported), HC (folld)

Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87; [2008] 2 CLJ 284, CA (refd)

Red and Yellow Omnibus Co Sdn Bhd & Anor v Chuah Lay Boon [1993] MLJU

112; [1993] 2 CLJ 480, HC (refd)
Yeo Ing King v Melawangi Sdn Bhd [2016] 5 MLJ 631; [2017] 1 CLJ 512, CA (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007
Housing Development (Control and Licensing) Act 1966
Rules of Court 2012 O 34, O 34 r 2, O 34 r 2(2), 2(2)(d), (2)(e)
Strata Titles Act 1985

Appeal from: Suit No 22–1993 of 2008 (High Court, Shah Alam)

Douglas Yee (Ong Chern Yii with him) (Douglas Yee) for the appellant.
Dhanaraj (Devandra and Kalai Selvi) (Kamil Hashim Raj & Lim) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] This appeal brings to the fore an adjectival or procedural issue that has a substantive legal effect on the outcome of issues to be determined at trial. It relates to a fundamental point of practice that is utilised in our courts on a daily basis in civil trials. It is unique to Malaysia and has evolved over time in terms of its application and consequences.

[2] The issue is that of the emplacement of documents to be utilised at trial in various categories. It is one of the most significant matters to be dealt with in the course of case management as such emplacement does in practice determine whether:

(a) the makers of documents are required to be present at trial to be cross-examined on the authenticity and contents of documents; and

(b) whether the litigating parties agree on the contents of any of the documents sought to be adduced at trial.

THE APPEAL BEFORE US

[3] This is an appeal by Tiow Weng Theong ('the defendant') against the decision of the High Court which held that he was liable for defamation against a company known as Melawangi Sdn Bhd ('the plaintiff'). The plaintiff's cause of action in defamation is premised on two documents, namely:

(a) a letter dated 25 June 2008 ('the letter'); and

(b) an email dated 13 October 2008 ('the email').

[4] In the High Court the learned judicial commissioner ('JC') found that the defendant did not defame the plaintiff in the letter, because there was no evidence that the defendant issued the letter and he denied doing so. However, the defendant did not deny sending the email. Accordingly the learned JC held that on a balance of probabilities, the defendant was the person who had sent the said email.

[5] The learned JC further held that the defendant defamed the plaintiff in the email.

[6] The defendant's appeal before us is therefore confined to the learned JC's findings in relation to the email and not the letter. The facts are not in dispute and are set out below.

THE SALIENT FACTS

[7] The plaintiff company is a wholly-owned subsidiary of Amcorp Group Bhd and the developer of a piece of commercial property known as the Amcorp Trade Centre ('ATC').

[8] ATC comprises the PJ Tower, Amcorp Tower, Melawangi Tower ('Menara Melawangi') and Amcorp Mall. The PJ Tower, Amcorp Tower and Amcorp Mall were completed sometime in the year 1997 while Melawangi Tower was completed sometime in the year 2006.

[9] ATC was initially managed by an agent, a company known as Jones Lang Wootton. On or around 17 July 2002, the plaintiff took over the management of ATC.

[10] The defendant is an individual who is currently an Executive Director of Euratech Industries Sdn Bhd. His late wife, Madam Kam Yew Ling, purchased Unit SS19–19 in Melawangi Tower ('the unit') sometime in 2003. The construction of Melawangi Tower was completed in 2006.

[11] Sometime in 2008, the defendant became a joint owner of the unit together with his wife. He then sought registration as and became a committee member of the Amcorp Trade Centre Owners and Tenants Association ('ATCOTA'). ATCOTA is an association registered with the Registrar of Societies on 4 June 2004.

[12] Since it was registered, ATCOTA raised many issues and complaints relating to the alleged mismanagement by the plaintiff of ATC but was ignored.

[13] At the time the PJ Tower, Amcorp Tower and Amcorp Mall were completed, the relevant statutory legislation were the Strata Titles Act 1985 and the Housing Development (Control and Licensing) Act 1966 which essentially gave developers of stratified property the right to manage the same.

[14] In April 2007, the Building and Common Property (Maintenance and Management) Act 2007 came into force. In accordance with this Act, the Joint Management Body ('JMB') of ATC was established on 8 April 2008 to maintain the common property of ATC. Its first annual general meeting ('the first AGM') was held on the same day to elect office holders of the JMB.

[15] The defendant was dissatisfied with the allegedly improper manner in which the first AGM was conducted and claimed that the chairman of the meeting, Yeoh Chong Keat, was clearly in cahoots with the plaintiff.

[16] First, the letter dated 25 June 2008 titled 'Complaint on the conduct of AGM on 8 April 2008 and Request for EGM' was published and distributed. The contents of the said letter are reproduced below:

> Dear Owners,
>
> Re: Complaint on the conduct of *AGM* on 08/04/2008 and Request for *EGM*
>
> The above said *AGM* proceeded despite numerous protests from owners present at the meeting. Any reasonable person reviewing the video recording of the *AGM* will agree that it was not proper as the concerns and objections were not adequately addressed.
>
> It was also clear that many of the attendees [estimated more than 50%] at the AGM were staff (including plumbers electricians and clerical staff) and business associates of Melawangi Sdn Bhd who somehow managed to obtain proxy rights. *Many did not even know whom they were representing*. They were only follow blindly the hand of Azlan Baqee, The Executive Director of Developer (Melawangi) who was somehow *allowed to sit at the stage*. It gives the impression that many of those voted into the JMC by staff and business associates of Melawangi Sdn Bhd are WELL connected to the latter either in personal capacity or through organizations which they have influenced.
>
> The AGM, instead of being a property owners meeting became a *developer's staff and business associates versus owners* meeting. What is surprising is that Melawangi Sdn Bhd's management and the Chair (who was from BDO) felt it was morally and professionally right to proceed with the *AGM*.
>
> Now, the suspicions of the owners start to reveal ...
>
> The statement of income and Expenses for the year ended 31st March 2007, we suffered a loss of (RM2,458,303).
>
> The summarized Income statements as at 31st March 2008, we suffered another 'unaudited' Loss of (RM2,548,155).

A The summarized Income statement as at 31st March 2008, also shows a Cumulative Losses of ... (RM10,796,365)

Now, you know *WHY* the Developer was working so hard to make sure the *Candidates of their choice* be selected by their 'controlled' proxies (more than 50%) influenced by *Azlan Baqee*, the Executive Director of Melawangi/Developer. (When
B his hand is up, the Candidate is Selected ... *MAGIC HAND!*)

BIG QUESTION! Does the Developer/Azlan Baqee has the *Right to Vote* at the 1st meeting of *AGM*?

Do *YOU* want a Manager who is 'Capable' of Incurring Cumulative Losses of
C (10.8mil)?

THE ONLY SOLUTION TO THE ABOVE PROBLEMS IS EGM.

Our main Objective is to Increase Income and cut *UNREASONABLE AND EXORBITANT EXPENSES.*

D *We are confident to turn the 2 years deficits of RM2.5mil each year, (2007 & 2008) into a PROFITABLE YEAR (2009).*

We must select a group of Dedicated and Committed Candidates who have *NO* conflict of Interest to form the JMC.

E You are welcome to offer yourself if you are willing to serve with total *commitment and sacrifice*.

YOUR ATTENDANCE AND SELECTION OF CANDIDATES in the EGM is UTMOST IMPORTANT!

F We will provide the information to you to make the *Right Choice of the Candidates.*

Please support by signing the letter to request for *EGM*. (We need 228 signatures, 25% of 910 owners)

Please contact us if you need any clarifications Jimmy Teo, 012-2211955, Ng Suet
G Hoh 019-2854299, Tan 013-3527209, Yeo 012-3918199, Calvin 012-2398018

We propose the new JMC to work closely with Amcorp Trade Centre Owners and Tenants Association. *(ATCOTA)*

We strongly encourage *YOU* to join *ATCOTA* to *safeguard your Interest.*

H

[17] ATCOTA lodged an official complaint with the Petaling Jaya City Council and the Commissioner of Buildings. The Commissioner of Buildings called for an extraordinary general meeting ('EGM') of the JMB to be convened on 19 October 2008. The plaintiff attempted to have the EGM
I postponed. When the Petaling Jaya City Council did not postpone the EGM, the plaintiff filed a judicial review action of the decision to call for the EGM as stated in the Petaling Jaya City Council's letter dated 23 September 2008. On 16 October 2008, the Shah Alam High Court granted an injunction restraining the EGM until the outcome of the judicial review application.

[18] During this period, one 'Jimmy Teo' sent an email dated 13 October 2008 titled 'Amcorpmall Amended Letters', the content of which is set out below:

> All Purchasers of Amcorp Trade Centre Vote to Protect Your Own Interest at EGM On 19-10-2008 at 2pm at PJ Club
>
> Pursuant to a meeting held by the Commissioner of Buildings ('COB') on 10-9-2008 at the Petaling Jaya City Council to enquire into the conduct of the existing Joint Management Committee of Amcorp Trade Centre ('JMC') the followings problems were raised:
>
> 1) The existing air-conditioning contract was awarded at an unusually expensive rate at RM350,000.00 per month to a company for a period of 10 years, one of its directors is the JMC Chairman.
>
> 2) One of the developer's employees awarded an outdoor advertising contract to another employee of the developer company.
>
> 3) The 4th JMC meeting approved the use of the sinking fund as a TNB deposit without the permission of Amcorp Trade Centre's owners.
>
> 4) JMC appointed the developer company as the managing agent, which is illegal.
>
> 5) **The developer presented an account that showed an unusually huge loss of RM10.8 million which was considered unreasonable by the COB.** (Emphasis added.)
>
> 6) Building Maintenance Fund has not been set up causing all monies to continue to be channelled to the developer's account. This is a serious offence.
>
> 7) The Joint Management Body of Amcorp Trade Centre Budget for the year ended 31.3.2009 places JMC in an estimated debt of RM2.955 million. JMC did not act prudently in adopting the Budget.
>
> 8) It is doubtful whether the JMC was formed legally because the developer used a lot of proxies to appoint its own employees to attend the AGM, which formed the JMC.
>
> In view of the above problems, the COB made the following recommendations:
>
> a) That an EGM be held on 19-10-2008 at 2 pm. The venue is now fixed at the PJ Club. The COB will send observers to the meeting.
>
> b) That the developer should appoint and pay for an international auditor firm to verify its accounts.
>
> You, as an owner of Amcorp Trade Centre, can make a difference by taking the following actions:
>
> i) Please attend the EGM on 19-10-2008 at 2pm at PJ Club.
>
> ii) Please be reminded to bring your original identity card to the EGM.
>
> iii) For Proxies, please bring your original identity cards together with the proxy forms duly signed by the owner and attested by the Commissioner for Oaths.

iv) Vote wisely to select JMC members who truly act independently and who act in the best interest of the owners.

THE FUTURE OF YOUR PROPERTIES IS IN YOUR HAND *VOTE WISELY If you support, please sign the letterH2 and fax to 03-79553649….. Immediately! If you want to give proxy to us, please sign the letter H1 and Courier to us.* Please confirm by email or sms if you are coming for the *EGM* Call Jimmy 012-2211955, Ng 019-2854299, Yeo 012-3918199 for clarification.

[19] Out of all the statements made in the email above, only the fifth paragraph (outlined and bold) was initially alleged to be defamatory in the statement of claim.

[20] The plaintiff's solicitors requested the defendant to withdraw the allegations, make an offer for damages and to undertake not to publish any similar libel in the future. The defendant did not comply.

[21] In 2008, the plaintiff initiated 13 separate defamation suits against 13 committee members of ATCOTA. Out of these 13 suits, nine were struck out upon the application of the relevant nine committee members while four suits remained, as the four committee members did not apply to strike out the suits against them. This appeal is one of those four suits.

[22] The High Court allowed the plaintiff's claim against the defendant and ordered damages to be assessed. On 31 May 2017, the High Court assessed damages at RM80,000.

[23] Ultimately two issues arose for consideration in this appeal, namely:

(a) the legal effect or consequence of including the email in Part A of the bundle of documents; and

(b) the adducing of further allegedly defamatory statements at trial which were not pleaded in the amended statement of claim

THE LEGAL EFFECT OR CONSEQUENCE OF INCLUDING THE EMAIL IN PART A OF THE BUNDLE OF DOCUMENTS

[24] This is the primary ground of the appeal. It relates to the adjectival position in law in relation to the classification of documents into separate categories, now usually described in practice as Parts A, B and C. Of particular concern here is the meaning to be ascribed to, and the legal consequences of placing documents in Part A.

[25] In this context, it is not in dispute that the the litigating parties agreed to place the email in Part A of the agreed bundle of documents. As a

consequence, it was marked in the course of evidence without reservation and admitted into evidence. A

[26] As it was so marked learned counsel for the defendant maintained that it amounted in effect to the plaintiff admitting or conceding that: B

(a) the email existed and was not therefore fabricated;

(b) the email had been authored by the maker stated in the email; and

(c) the plaintiff admitted that the contents of the documents were true. C

[27] It is the last of the three propositions that gave rise to serious dispute in this and other appeals. By admitting that the contents of the documents were true, there would effectively be a concession that the very statements that the plaintiff had challenged as being defamatory were in fact true. This in turn would have the legal consequence that the defence of justification had been proven or conceded to by the plaintiff. The plaintiff would therefore have no further basis for its claim in defamation. D

[28] It is important to point out that the option was given to the plaintiff (through its counsel) to retract or remove the relevant document from the category known as Part A and for it to be placed in Part B during the course of the trial. However the plaintiff refused this offer and insisted on the email remaining in Part A. E

[29] As far as the plaintiff was concerned, the emplacement in Part A did not mean that the contents were admitted to, but simply that the plaintiff agreed to the contents of the documents but not the truth of the contents. F

[30] The High Court agreed with this latter contention and held that the inclusion of the said email in Part A was not an agreement that the defamatory statements were true. In so finding, the learned JC adopted the decision of this court in a case which originated from one of the four suits brought by the plaintiff against the committee members of ATCOTA. G

[31] The case in question is *Yeo Ing King v Melawangi Sdn Bhd* [2016] 5 MLJ 631; [2017] 1 CLJ 512 CA, ('Yeo Ing King') where His Lordship Abdul Rahman Sebli JCA held in a majority judgment as follows: H

> Having given careful consideration to the matter, we take the view that *what r 2(2)(d) envisges is only agreement on the contents of the documents and not the truth of the contents, unless agreed by the parties*. In the present case, there was no such agreement between the plaintiff and the defendant at the pre-trial case management. Therefore the agreement by the parties to place the documents in Part A of the BOD was only an agreement that the documents contained the I

impugned defamatory statements and not an agreement that the defamatory statements and not an agreement that the defamatory statements were true of the plaintiff. (Emphasis added.)

[32] Prasad Sandosham Abraham JCA concurred with Abdul Rahman Sebli JCA that the emplacement of documents in Part A meant only that there was agreement on the contents of the documents but not on the truth of the same.

[33] However there was one dissenting view, that of Hamid Sultan Abu Backer JCA. His Lordship in a, with respect, comprehensive and all encompassing judgment explored and explained the basis for treating documents in Part A as having been accepted both as to authenticity and truth. It would not be beneficial for us to reproduce large portions of the dissenting judgment here. Suffice for us to state that, with respect, we concur with the position taken there that when documents are placed in Part A, both authenticity and contents are no longer in dispute.

WHAT DOES O 34 WHICH PROVIDES FOR PRE TRIAL CASE MANAGEMENT STATE IN RELATION TO THE FILING OF BUNDLES OF DOCUMENTS TO BE UTILISED AT TRIAL?

[34] It is necessary to consider the express provisions of O 34 r 2(2)(d) and (e) to comprehend the legal basis for the categorisation of bundles of documents to be utilised at trial:

> 2(2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including —
>
> (a) ...
>
> (b) ...
>
> (c) the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness;
>
> (d) the contents of the bundle of the documents referred to in subparagraph (c) *shall be agreed on between all parties as far as possible and this bundle of agreed documents shall be filed by the plaintiff and marked as Part A*;
>
> (e) *if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each bundle shall be filed by the plaintiff and marked as follows:*

(i) *Part B — documents where the authenticity is not disputed but the contents are disputed*;

(ii) *Part C — documents where the authenticity and contents are disputed;*

... (Emphasis added.)

[35] As stipulated in O 34 r 2(2)(d) and (2)(e), bundles of documents filed at trial fall within three separate bundles, Parts A, B and C. Part A is envisaged as being agreed on by all parties as far as possible. Does that encompass the truth of the contents of the documents?

[36] To answer that question it is necessary to consider O 34 r 2(2)(e). It provides that documents where the authenticity is agreed but the contents are in dispute, the documents are to be placed in Part B. This in turn means that while the parties are in agreement that such a document exists and is not a fabrication, the contents of the document remain in dispute. So the relevant witness is to be present at trial to be cross-examined on the contents only, of the document.

[37] And Part C deals with a situation where the parties cannot agree on either the authenticity or the content. In other words the very existence of the document is disputed, as must therefore be, the content. The party seeking to have the document admitted into evidence should therefore ensure that the maker of the document is present at trial to be cross-examined on both authenticity and content.

[38] What then is the construction to be placed on a Part A document? It follows logically that if Part B deals with a situation where the content of the document is in dispute and Part C deals with a situation where both the authenticity and content are in dispute, then that can only leave Part A as comprising documents where both the authenticity and the content of the document are NOT in dispute. Any other construction would render the categorisation accorded to Parts B and C nugatory.

[39] What is the meaning to be afforded to the phrase the content of the document is agreed or not in dispute? It means that the words comprising the content of a document are not disputed. It means that the words comprising the content of the document are agreed.

[40] In *Yeo Ing King*'s case the majority judgment drew a distinction between:

(a) agreement on the contents of the documents; and

(b) the truth of the contents of the documents.

A **[41]** In other words that agreement as to the contents of documents was different from agreement on the truth of the contents of the documents.

[42] It was further held that the truth of the contents of the documents had to be expressly further agreed upon by the parties, by reason of the words 'shall be agreed on between all parties as far as possible ...' in O 34 r 2(2)(d). The construction that was placed on the said rule therefore was that with respect to Part A documents, parties had to agree on the documents as far as possible and had to separately and specifically agree that the truth of the contents of the documents was also agreed upon.

[43] Our construction of O 34 r 2(2)(d) and (2)(e) which is consonant with the dissenting judgment of Hamid Sultan Abu Backer JCA, is that Part A documents, which prescribe that both the authenticity and the contents of documents are agreed, must mean that the truth of the content of the documents are agreed upon between the parties. Otherwise they would simply be placed in Part B.

[44] This begs the question as to whether there is any distinction between agreement on the contents of a document and the truth of the contents of that document. This is perhaps best answered or illustrated by way of an example. Let us say that the document in question contains the following statement:

> I saw Mr X at the meeting on the 5 April 2018 and I heard him state that the profits of the company for the previous year amounted to RM12 million.

[45] If the document were to be placed in Part A then that would mean that the person who authored the document need not be called to testify as the authenticity of the document is not in question.

[46] If the parties agree as to content, then it means that the party producing the document and the opposing party both agree that the content of the document is not in dispute.

[47] What then is not in dispute? It can only mean that the statement that 'I saw Mr X at the meeting on 5 April 2018 and I heard him state that the profits of the company for the previous year amounted to RM12 million' is agreed or not disputed.

[48] That in turn can only mean that the parties agree or do not dispute that the author of the document saw Mr X at the meeting on 5 April 2018 and heard him state that the profits for the previous year amounted to RM12m.

[49] If the opposing party agrees or accepts this content, then it must follow

that the fact of the matters stated in the document are accepted and agreed. If the fact of the matters stated there are accepted and agreed this means that the truth of the contents has also been accepted.

[50] In other words, there is no tangible or discernible distinction between agreement or a lack of dispute as to the contents of the document, and the truth of the contents of the document.

[51] Accordingly a Part A document necessarily refers to agreement not only on authenticity but on the truth of the content of the document.

[52] We are fortified in our conclusion on this issue by a consideration of *Practice Direction Number 2 of 2014* relating to pre-trial case management in accordance with O 34 of the Rules of Court 2012. With reference to r 2(2) and the bundling of documents there is an express provision for Part A, B and C documents. With respect to documents falling within the category of Part A, the practice direction states as follows:

> Bahagian A: Dokumen yang keesahan dan kandungannya di persetujui.

[53] This translates to 'Documents where the authenticity and contents are agreed'.

[54] Following from our analysis and conclusion that there is no real distinction between agreement on the contents of documents and the truth of the contents of documents, we are of the view that Part A documents refer to documents where the authenticity and the truth of the contents of the documents are not in dispute.

[55] *Malaysian Civil Procedure 2018, Vol 1* states, inter alia, as follows in its commentary on O 34 r 2 in relation to Part A documents:

> *Part A documents* — When a document is placed in Part A, the parties agree to the truth of its contents. In other words, the parties agree that the document correctly states the facts contained in it ...

[56] We respectfully concur with the opinion of the writer in the commentary. As further pointed out there, it is important when reading the older cases on agreed and non-agreed bundles, care has to be taken to consider the manner in which documents were bundled at that time. Bundles were generally divided into 'agreed' and 'non-agreed' categories.

[57] For example *Practice Note No 1 of 1948 on Documentary Evidence* provided as follows:

> In Civil Suits in the Supreme Court, where an Advocate and Solicitor is engaged on either side, it is his duty to assist the Court by presenting documentary evidence in the most convenient possible manner. In most cases it is possible to agree with the majority of documents which will be required in evidence. In every such case they should be so agreed and copies should be made and bound ...In all cases where documents cannot be agreed copies must be available and can conveniently be bound and paged in another bundle.

[58] There were thus only two categories of documents — agreed and non-agreed bundles. There was no separate categorisation between documents where the authenticity and contents were not in dispute and documents where the authenticity was not in dispute but the contents were. In other words, there was no sub-categorisation of the agreed bundle into Part A and Part B as is currently the practice.

[59] Similarly with *Practice Note No 2 of 1977* which provided:

> Bundle of Documents
>
> Immediately after the affidavits of documents from both sides have been filed, whether as the result of due compliance by the solicitors or under an order of court, and after such inspection of the documents as is deemed necessary, the solicitor having the conduct of the case, generally the solicitor for the plaintiff, shall request the co-operation of the other side and prepare and file the relevant Bundle or Bundles of Documents. All documents agreed by either side as not to require proof of their existence will be put in a bundle in order of date and Bundle marked 'Bundle of Documents Agreed.
>
> All other documents are to be put in another bundle, similarly in chronological order and marked 'Bundle of Documents not agreed.

[60] Again there were only two sets of documents envisaged, and no distinction drawn between Part A and Part B documents.

[61] This issue is of importance in considering and citing case-law relating to what was agreed between the parties during that era and the present times. Cases such as *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 which is often cited to explain how an agreed bundle of documents is to be considered has been discussed both in the majority and dissenting judgments in *Yeo Ing King*. However at that time there was no distinction between Part A and Part B documents as currently subsists. In other words there were only two bundles, namely the agreed and the non-agreed bundles. Currently the practice is to categorise documents into three bundles namely Parts A, B and C. So when Peh Swee Chin FCJ stated, inter alia, that:

> First and foremost, the agreed bundle of documents means that the documents

therein are authentic and they do exist, therefore they require no proof of their authenticity by calling example their makers. A

Secondly the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties. B

[62] This part of the judgment has to be read in the context of the categorisation of documents in two parts only — the agreed and the non-agreed bundles only. As such it would indeed follow that only authenticity is dispensed with in an agreed bundle while there has to be express agreement between the solicitors that the truth of the contents is also not disputed. Otherwise the contents are taken as being in dispute. C

[63] However with the further sub-categorisation of an agreed bundle into Parts A and B, the need to specifically agree that the truth of the contents of the documents becomes nugatory. This is because Part A deals with both authenticity and content. Once the content is agreed it follows that the truth of the content cannot be in dispute, as explained earlier. So the application of those statements in the judgment ought not to be applied in the present context in light of our current practice as stipulated in O 34 r 2(2)(d) and (e) and *Practice Direction No 2 of 2014*. D E

[64] Similarly with the dicta of Gopal Sri Ram JCA in the case of *Jaafar Shaari* and the case of *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 as well as *Red and Yellow Omnibus Co Sdn Bhd & Anor v Chuah Lay Boon* [1993] MLJU 112; [1993] 2 CLJ 480. F

[65] We would again reiterate that we concur, respectfully with the comprehensive dissenting judgment in *Yeo Ing King* as well as another decision of this court in *Melawangi Sdn Bhd v Lim Kian Hian* (Suit No 22–1946 of 2008) (unreported) ('Lim's suit'). G

[66] In Lim's suit the learned High Court judge followed the established line of authorities as well as practice and held, inter alia, that Part A documents that are admitted into evidence are agreed as to their authenticity and truth of the contents. Consequently, as the defamatory document had been placed in Part A of the agreed bundle of documents and admitted into evidence, the defamatory statements were justified. H

[67] On appeal, this court unanimously upheld the learned trial court's judgment and dismissed the appeal. By so doing there was effectively agreement with the dissenting judgment in *Yeo Ing King* and disagreement with the majority judgment. I

[68] We would concur with learned counsel for the appellant in the instant case that the preponderance of authorities confirm that Part A documents that are admitted into evidence are agreed as to their authenticity and truth of the contents. As stated by learned counsel, as far back as 2008, this court in *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87; [2008] 2 CLJ 284 held:

> It is a well accepted practice in the Civil Division of the High Court in Kuala Lumpur that Bundle of Documents B are categories of documents where both parties have, before the commencement of hearing, agreed to its production without the need to call the maker ... And if a document is put in Bundle A, where the parties have agreed to its production and content, no party would be allowed to ask any question at all on that document ...

[69] And in *Amgeneral Insurance Bhd v Sharul Ahmad & Anor* [2015] 1 CLJ 532 at pp 538–539 the court stated:

> [29] it is trite that documents in Part A cannot be disputed as to their content and authenticity ...
>
> [31] By admitting these agreed documents as Part A documents the Respondent/Plaintiff had admitted not only their authenticity but also to the truth of the contents.

[70] In *CB Land Sdn Bhd v Syarikat Perumahan Negara Bhd* [2015] 7 CLJ 753 the court held that:

> [1] All the documents relied on by the parties are to be found in two volumes marked as CBD1 and 2. These documents are all agreed in terms of authenticity and contents; what is generally understood as Part A type of documents.

[71] The learned JC who determined this case at the High Court level held as follows in *Bidari Ehsan Sdn Bhd (in Liquidation) v Inai Tropika Sdn Bhd* [2015] MLJU 378; [2015] 1 LNS 714:

> [24] Furthermore, the parties, particularly the Defendant has already admitted to both the authenticity and the content of the July Agreement as the July agreement was marked as a Part A document.
>
> And the law is trite in this respect. In that, a document marked as Part A document cannot be put under scrutiny or be asked any question on ...

[72] For all the reasons enunciated above, we are of the considered view that when litigating parties place their documents in bundles marked as Part A, as opposed to Parts B or C, they are expressly acknowledging and accepting that:

(a) the authenticity of the document/s in question are not in dispute. This means the existence of the document is accepted. It is not a fabricated or fictitious document; and

(b) secondly the contents of the document/s or the truth of the contents of the document/s is not in issue either. This means that the parties agree that whatever the content of the document, it is agreed upon and accepted.

[73] It is therefore incumbent upon counsel, when categorising documents to exercise considerable care in determining which particular category a document or series of documents falls into. This will have a determinative effect on the substantive legal issues that fall for adjudication in the trial court. A misapprehension of the effect or consequences of categorisation can lead to undesirable legal results for one of the litigating parties.

[74] It should be emphasised that the emplacement of documents is not intended to set up a 'trap' by one litigating part against the opposing party purely to avoid proof of documents or a defence. On the contrary, O 34 r 2(2) and *Practice Direction 2 of 2014* exist to make court practice easier and more economical.

[75] It bears repeating that the importance of preparing bundles for trial serves, inter alia, the following purposes:

(a) to assist the court by presenting documentary evidence in the most convenient possible matter as stated in Practice Note No 1 of 1948;

(b) to make available to the court all relevant documentary evidence that is likely to be utilised in the course of the trial;

(c) to enable the opposing party to prepare to meet his adversary's case adequately and efficiently at trial so that he is not taken by surprise;

(d) the placing of the documentary evidence in three parts enables the judge at the pre-trial case to assess the nature of the case, the likely time to be expended on the case and to ascertain the issues that are likely to be the focus of the trial;

(e) to enable litigating parties to assess accurately the precise number of witnesses they have to call to establish their individual cases;

(f) the placement of documents in these categories may well facilitate even the adjudication or determination of issues of fact and law, thereby ensuring an expeditious trial;

(g) to facilitate a smooth trial and to enable witnesses to have ready and easy access to relevant documents; and

(h) it can promote mediation and settlement before trial.

[76] For the reasons cited above, we conclude that the learned judge erred in holding that the documents in Part A required proof of the truth of the contents of the documents. As we have concluded that no such proof is necessary, it follows that the defence of justification is made out. In other words the categorisation of the email in Part A effectively means that the contents are not in dispute or are agreed. As the contents are agreed to by the plaintiff he effectively accepts what is stated in the email. Agreeing and accepting the contents of the email means that the plaintiff accepts the truth of the same. This in turn can only lead to the legal consequence that justification is made out.

THE ADDUCING OF FURTHER ALLEGEDLY DEFAMATORY STATEMENTS AT TRIAL WHICH WERE NOT PLEADED IN THE AMENDED STATEMENT OF CLAIM

[77] The second issue that arose for consideration is whether the plaintiff could lead evidence on allegedly defamatory statements at trial which had not been specifically pleaded.

[78] In this context, the defendant submitted that initially, the plaintiff pleaded in its statement of claim that only one statement in the email is defamatory, namely:

> (5) The developer presented an account that showed an unusually huge loss of RM10.8 million which was considered unreasonable by the COB ...

[79] However, during the trial, the plaintiff had in its sole witness' statement, WSPW1, attempted to introduce further alleged defamatory statements. In Q&A 9, PW1 attempted to suggest that four other statements in the email are defamatory of the plaintiff, namely:

(a) the existing air-conditioning contract was awarded at an unusually expensive rate at RM350,000 per month to a company for a period of ten years, one of its directors is the JMC Chairman;

(b) one of the developer's employees awarded an outdoor advertising contract to another employee of the developer company;

(c) the fourth JMC meeting approved the use of the sinking fund as a TNB deposit without the permission of Amcorp Trade Centre's owners;

(d) JMC appointed the developer company as the managing agent, which is illegal;

(e) the developer presented an account that showed an unusually huge loss of RM10.8m which was considered unreasonable by the COB; and

(f) building maintenance fund has not been set up causing all monies to continue to be channelled to the developer's account. This is a serious offence.

[80] After the trial, the plaintiff attempted to raise even more alleged defamatory statements in the email. In paras 41–61 of the plaintiff's written submissions, it was submitted that there were eight defamatory statements in the email. The additional allegedly defamatory statements are:

(a) the existing air-conditioning contract was awarded at an unusually expensive rate at RM350,000 per month to a company for a period of ten years, one of its directors is the JMC Chairman;

(b) one of the developer's employees awarded an outdoor advertising contract to another employee of the developer company.

(c) the fourth JMC meeting approved the use of the sinking fund as a TNB deposit without the permission of Amcorp Trade Centre's owners;

(d) JMC appointed the developer company as the managing agent, which is illegal;

(e) the developer presented an account that showed an unusually huge loss of RM10.8m which was considered unreasonable by the COB;

(f) building maintenance fund has not been set up causing all monies to continue to be channelled to the developer's account. This is a serious offence;

(g) the Joint Management Body of Amcorp Trade Centre Budget for the year ended 31 March 2009 places JMC in an estimated debt of RM2.955m. JMC did not act prudently in adopting the budget; and

(h) it is doubtful whether the JMC was formed legally because the developer used a lot of proxies to appoint own employees to attend the AGM, which formed the JMC.

[81] The High Court JC agreed with the submission of the plaintiff's counsel that the plaintiff's pleaded case is not limited and confined to only one allegedly defamatory statement in the said email, for two reasons. The learned JC considered that first, the further allegedly defamatory statements were not derived from other publications but from the same impugned email. Secondly, His Lordship opined that the defendant would not suffer any prejudice because he is fully aware of the whole contents of the impugned email and was not caught by surprise.

[82] With respect, we differ from the learned JC's conclusion for the following reasons:

(a) as submitted by learned counsel for the defendant, the law in relation to pleadings in a defamation case is clear. The allegedly defamatory words should be set out in verbatim in the particulars of claim and usually in the form of a quotation. A description or summary of the content, purport or effect is insufficient (see *Gatley on Libel and Slander* (11th Ed) at para 28.11);

(b) this is borne out by the decision of this court in *Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629; [2017] 6 CLJ 129: '... the very words complained of, whether stated orally or published, are the facts on which the action is grounded. In other words these are material facts which must be pleaded so that the defendant knows the precise charge against him and is then able to defend himself against it ... It is essential to set out the actual words used so that the court can then decide, as a matter of law, whether the said words whether oral or published give rise to the defamatory imputations alleged ...'; and

(c) in the instant case there was only one allegedly defamatory statement pleaded in verbatim and in the form of a quotation.

[83] Accordingly it follows that any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon. The learned JC in this regard erred in allowing the plaintiff to adduce additional alleged defamatory statements in verbatim and in the form of quotations mid trial and even after trial. This amounts to a breach of natural justice as the defendant was not able to meet the case of the plaintiff which was being litigated in stages and which caught the defendant off guard. This occasioned prejudice to the defendant. The fact that the learned JC considered all the additional allegedly defamatory statements and found them to be defamatory compounded matters further, resulting in a miscarriage of justice. We are therefore constrained to intervene in an appellate capacity.

[84] The trial of the matter ought to have been confined to the single allegedly defamatory statement pleaded in the statement of claim.

CONCLUSION

[85] In these circumstances we are of the unanimous view that the emplacement of the email in Part A of the bundle of documents resulted in the defence of justification being made out, as explained in extenso earlier.

[86] On the pleadings point, we also agree with the appellant/defendant that

the respondent/plaintiff could not raise the other defamatory statements which were not pleaded.

[87] The appeal is therefore allowed with costs of RM60,000 here and below, subject to allocatur. The order of the High Court is set aside. The deposit is refunded.

Appeal allowed with costs of RM60,000 subject to allocatur.

Reported by Afiq Mohamad Noor